UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

VW CREDIT, INC.

and **Case 13-CA-158715**

KELLEY HELLMAN

VOLKSWAGEN GROUP OF AMERICA, INC.

and **Case 13-CA-166961**

KELLEY HELLMAN

VOLKSWAGEN GROUP OF AMERICA, INC.'S AND VW CREDIT, INC.'S
RESPONSE TO THE BOARD'S NOTICE TO SHOW CAUSE SUPPORTING REMAND

Respondents Volkswagen Group of America, Inc. and VW Credit, Inc. (collectively, "Volkswagen") respectfully submit the following response to the Board's October 29, 2018 Notice to Show Cause:

I. Background.

On March 31, 2016, as corrected on April 6, 2016, the General Counsel, through the Regional Director for Region 13, issued an amended consolidated complaint ("complaint") alleging that each Respondent violated Section 8(a)(1) of the National Labor Relations Act by maintaining "a mandatory arbitration agreement for certain of its employees that employees reasonably would believe bars or restricts their right to file charges with the Board."

On September 2, 2016, the parties filed a joint motion to waive a hearing and a decision by an administrative law judge and to transfer this proceeding to the Board for a decision based on a stipulated record. On December 2, 2016, the Board issued an Order Approving Stipulation, Granting Motion, and Transferring Proceeding to the Board.

Thereafter, the Respondents (jointly) and the General Counsel each filed opening briefs and answering briefs. In their briefs, the parties raised and discussed three issues:

1. Whether the arbitration agreement was unlawful under the "reasonably construe" prong of the Board's decision in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004).

2. Whether Respondents had effectively repudiated the alleged unlawfulness in the arbitration agreement, under the Board's decision in *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978), by issuing a notice to their employees that affirmed the employees' rights to file Board charges and stated that the arbitration agreement would be read to include the statement, "[t]his Agreement does not restrict your rights to file charges with the NLRB."

3. Whether the amended arbitration agreement currently used by Volkswagen is unlawful under the "reasonably construe" prong of *Lutheran Heritage*. The amended agreement is identical to the previous agreement except that it adds the language, "[t]his Agreement does not restrict your rights to file charges with the NLRB."

On October 29, 2018, the Board issued a Notice to Show Cause. The Board observed that the General Counsel had relied on the "reasonably construe" prong of *Lutheran Heritage* in support of the complaint's allegation that the arbitration agreement was unlawful. The Board further observed that its decision in *The Boeing Co.*, 365 NLRB No. 154, slip op. at 14-17 (2017), overruled the "reasonably construe" analysis and announced a new standard that applies retroactively to all pending cases. Accordingly, the Board's Notice asked why the Board should not remand this case to the Regional Director for Region 13 for further proceedings consistent with the Board's decision in *Boeing*.

II. <u>The Board Should Remand This Case</u>.

Volkswagen supports remanding this case to the Regional Director. The Board's landmark *Boeing* decision overruled *Lutheran Heritage*'s "reasonably construe" analysis and

established a new standard for evaluating employer policies. New case law must be developed under the *Boeing* standard, and it is appropriate for administrative law judges to begin the process of developing that case law in the first instance—subject, ultimately, to review and approval by the Board. Accordingly, Volkswagen believes it is appropriate for the Board to remand this matter to the Regional Director for assignment to an administrative law judge.

The General Counsel opposes remand because, in the General Counsel's view, another case, *Prime Healthcare Paradise Valley, LLC*, 21-CA-133781, "raises the same issues presented in the instant proceeding," and a decision in that case "will likely obviate the need to remand the instant cases." Volkswagen does not understand whether the General Counsel is contending that the issues in *Prime Healthcare* are *identical* (or substantially identical) to those in this case, such that a decision in *Prime Healthcare* would effectively resolve this case as well, or merely that the issues in *Prime Healthcare* are *similar* to those in this case, such that a decision in *Prime Healthcare* would be helpful—though not dispositive—in resolving this case. Either way, the pendency of *Prime Healthcare* is not a basis to oppose remand in this case.

To the extent the General Counsel is contending that the issues raised in *Prime Healthcare* are identical (or substantially identical) to those in this case, the General Counsel is mistaken. Volkswagen's arbitration agreement is different from the agreement in *Prime Healthcare*, and much of the previous briefing in this case concerned the particular wording and structure of Volkswagen's arbitration agreement. In addition, this case involves Volkswagen's defense that it repudiated any alleged unlawfulness; no such defense was raised in *Prime Healthcare*. Finally, Volkswagen's amended agreement contains a savings clause expressly

preserving employees' rights to file Board charges. No savings clause is involved in *Prime Healthcare*.[1] Thus, a decision in *Prime Healthcare* would not dispose of this case.

Alternatively, if the General Counsel means only that a decision in *Prime Healthcare* would be helpful in deciding this case, that is not a reason to oppose remand. Assuming that a decision in *Prime Healthcare* would be helpful, there is no reason why an administrative law judge—who is bound to follow the Board's decisions—could not apply *Prime Healthcare* to this case in the first instance. Moreover, if the General Counsel believes that this case should be stayed until *Prime Healthcare* is decided, that, too, is an argument the General Counsel may present to an administrative law judge.

For the foregoing reasons, Volkswagen supports remand of this case. If the Board declines to remand the case, Volkswagen requests that the Board permit Volkswagen to submit new briefing analyzing this case under the *Boeing* standard.

III. Volkswagen's Concerns Regarding the General Counsel's Brief in *Prime Healthcare*.

Having reviewed the General Counsel's brief in *Prime Healthcare* (which the General Counsel attached as an exhibit to its response to the Board's Notice to Show Cause), Volkswagen is concerned that the General Counsel's position in that matter is not consistent with either *Boeing* or *Epic Systems Corp. v. Lewis*, 584 U.S. __, 138 S. Ct. 1612 (2018). Volkswagen acknowledges that it is not a party to *Prime Healthcare* and that it has not been invited to submit briefing in that case—and Volkswagen does not intend, in this Response, to fully analyze all of the issues raised in *Prime Healthcare*. Nonetheless, because the General Counsel attached its *Prime Healthcare* brief, Volkswagen feels obligated to briefly summarize its concerns regarding that brief for the Board's consideration:

[1] Like Volkswagen, Prime Healthcare amended its arbitration agreement to add a savings clause, but the General Counsel did not allege that Prime Healthcare's amended agreement would be understood by employees to restrict their rights to file Board charges.

- *First*, chief among Volkswagen's concerns is that the General Counsel appears to be asking the Board to adopt a comprehensive set of rules for deciding *all* cases involving arbitration agreements—including arbitration agreements with features not present in the *Prime Healthcare* agreement. (G.C. Br.[2] 9-11.) *Boeing* did not authorize the wholesale creation, in a single case involving a single arbitration agreement, of a comprehensive ruleset to be used to decide all cases involving arbitration agreements. Rather, *Boeing* intended that the law would continue to develop as it always has: one case at a time, resulting from analysis of the issues presented in that case. 365 NLRB No. 154, slip op. at 15 (describing the new test, which is to be applied to employer policies that are "at issue").[3]

- *Second*, as best the undersigned counsel can discern from the *Prime Healthcare* docket, no opposition briefing has been submitted in *Prime Healthcare*. (NLRB Case Search, *https://www.nlrb.gov/case/21-CA-133781* (last visited Nov. 13, 2018); *see also id.* at "08/06/2018 ES Office EOT Response" (setting briefing deadline of Aug. 31, 2018 for both parties).)

- *Third*, the General Counsel does not appear to be applying *Boeing* correctly. Under *Boeing*, the Board must determine the extent of the impact that an employer's policy will have upon Section 7 activity, and weigh that impact against the employer's legitimate justifications for the policy. 365 NLRB No. 154, slip op. at 15. The General Counsel, however, skips both of these steps. (G.C. Br. 9-11.) The General Counsel thus fails to consider the extent of the impact it alleges these agreements will have on employees exercising their right to file

[2] Citations to "G.C. Br." are citations to the General Counsel's brief in *Prime Healthcare*, attached as Exhibit A to the General Counsel's response to the Board's Notice to Show Cause in this matter.

[3] Although *Boeing* established three "Categories" that it believed cases would fall into, it made clear that those Categories describe only "a classification of the *results* from . . . the new test. The categories are not part of the test itself." *Id.*, slip op. at 5, 16. *Boeing*, therefore, did not authorize the General Counsel to propose a ruleset for dividing all arbitration agreements among the three Categories, as it does in its brief. (*See* G.C. Br. 9-11.)

Board charges (which extent may be minimal or non-existent), and fails to weigh that impact against the employers' justifications for maintaining the agreements (which justifications may be substantial). (*See id.*) Instead, the General Counsel concludes that it need not weigh these factors because the rights at issue always "outweigh any . . . justification" for any intrusion, no matter how slight. (*Id.* at 8, 11.)[4] Such a conclusion is directly contrary to *Boeing*'s mandates. Indeed, the General Counsel's analysis, which focuses solely on how the agreements supposedly will be "reasonably underst[ood]," hews far closer to *Lutheran Heritage*'s "reasonably construe" test than to *Boeing*'s balancing test. (*See id.* at 9-10.)

- *Fourth and finally,* the General Counsel fails to give appropriate deference to private parties' rights to enter into arbitration agreements, as expressed in the *Epic* decision. The General Counsel pays lip service to *Epic* and acknowledges that arbitration provisions are "entitled to greater deference," that "the NLRA should . . . not be read [to] . . . essentially negate the parties' agreements under the FAA," and that "an arbitration agreement should be enforced, unless it is clearly in conflict with the NLRA." (G.C. Br. 4, 8.) But the General Counsel then declares unlawful all arbitration agreements with "exclusivity" language (*e.g.*, agreements that state merely that arbitration will be the parties' sole or exclusive forum for resolving disputes, or that provide that arbitration is the parties' sole or exclusive remedy). (*Id.* at 9, 11.) The General Counsel apparently concludes that such agreements are "clearly in conflict with the NLRA," even if they make no mention of the NLRA or administrative remedies in general. (*See id.*)

In so concluding, the General Counsel ignores that the primary purpose of arbitration agreements is to require that *private disputes traditionally resolved in court* (not administrative

[4] The General Counsel correctly recognizes *Boeing*'s instruction to "differentiate among different types of NLRA-protected activities (some of which might be deemed central to the Act and others more peripheral)." 365 NLRB No. 154, slip op. at 16. However, that a particular right allegedly is central to the Act does not obviate *Boeing*'s requirement to weigh the extent of the intrusion upon that right against the justifications for the policy. *See id.*, slip op. at 15-16.

matters) be resolved through arbitration, and that "exclusivity" language may reasonably be thought necessary to ensure that the right to file a dispute in court is fully replaced with arbitration. The reader of such an agreement is likely to understand "exclusivity" language in this context as well, and would not think the agreement prohibits administrative relief. By stretching to reach the conclusion that this neutral, reasonable language somehow implicates the NLRA, the General Counsel violates what it concedes are *Epic*'s dictates that "the NLRA should . . . not be read [to] . . . essentially negate the parties' agreements under the FAA." (G.C. Br. 4.)

Therefore, Volkswagen respectfully submits that the Board should critically evaluate the General Counsel's position in *Prime Healthcare*, and Volkswagen objects to the extent that the General Counsel is seeking to use *Prime Healthcare* as a basis to resolve the instant case without further briefing from the parties.

CONCLUSION

For the foregoing reasons, Volkswagen requests that the Board remand this case. If the Board declines to remand the case, Volkswagen requests that the Board permit Volkswagen to submit new briefing analyzing this case under the *Boeing* standard. Finally, for the Board's consideration, Volkswagen has expressed its concerns regarding the General Counsel's brief in the *Prime Healthcare* case.

Dated: November 13, 2018

Respectfully submitted,

By: */s/ Lynne D. Mapes-Riordan*

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CERTIFICATE OF SERVICE

The undersigned, an attorney, states that on **November 13, 2018**, she caused the foregoing document to be E-Filed via the electronic filing system at www.nlrb.gov and served, via email, to the following parties:

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